

Rule 5, Ariz. R. Crim. Proc.

PRELIMINARY HEARINGS – Role of the magistrate.....Revised 12/2009

Article II, § 30 of the Arizona Constitution provides in part: “[N]o person shall be prosecuted for a felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination.”

A.R.S. § 1-215(18) defines “magistrate”:

“Magistrate” means an officer having power to issue a warrant for the arrest of a person charged with a public offense and includes the chief justice and judges of the supreme court, judges of the superior court, justices of the peace and police magistrates in cities and towns.

In *Dunlap v. Superior Court*, 169 Ariz. 82, 85, 817 P.2d 27, 30 (App. 1991), the Court explained that all judicial officers sitting as magistrates have “equal rank” and identical powers:

It is well recognized that a superior court judge may sit as a committing magistrate for the purpose of holding a preliminary examination to determine probable cause. *Sheridan v. Superior Court*, 91 Ariz. 211, 213-214, 370 P.2d 949, 951 (1962). The jurisdiction of a superior court judge to act as a magistrate for this purpose is created by statute. *Wilson v. Garrett*, 104 Ariz. 57, 58-59, 448 P.2d 857, 858-59 (1969). His powers and duties as a magistrate are solely those conferred upon him by the Rules of Criminal Procedure and applicable statutes. See *State ex rel. Mahoney v. Stevens*, 79 Ariz. 298, 300, 288 P.2d 1077, 1078 (1955). His status and jurisdiction, sitting as a magistrate, is neither enlarged nor diminished by the extent of his jurisdiction to hear or try criminal cases.

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It is apparent from the foregoing that when exercising the functions of a magistrate, a superior court judge takes on a role

separate and apart from his superior court duties. He is an *ex officio* magistrate with narrowly restricted power and jurisdiction.

Id. at 84-85, 817 P.2d at 29-30.

The role of the committing magistrate in a preliminary hearing is generally limited to finding probable cause. “The function of the committing magistrate at a preliminary hearing is to determine whether there is probable cause that defendant committed the offense charged in the complaint; if he so finds bind him over to the Superior Court for trial; and if not release him.” *State v. Superior Court*, 103 Ariz. 369, 372, 442 P.2d 113, 116 (1968). The Arizona Supreme Court has stated that since a preliminary hearing does not determine the defendant’s guilt or innocence, “a magistrate conducting a preliminary hearing should be mindful that his duty is not to determine the ultimate guilt or innocence of a defendant, or determine the degree of the crime charged, but only to determine whether there is probable cause to believe defendant guilty of the offense charged, and leave to the trial tribunal the final determination of the application of the law to the facts and leave to the jury the question as to whether defendant is guilty of the offense charged or of an included offense.” *Dodd v. Boies*, 88 Ariz. 401, 402, 357 P.2d 144, 145 (1960), quoting *Application of Williams*, 85 Ariz. 109, 117-118, 333 P.2d 280, 285-286 (1959). In *Drury v. Burr*, 107 Ariz. 124, 125, 483 P.2d 539, 540 (1971), the Arizona Supreme Court stated, “Where there is more than one inference equally reasonable then probable cause does not exist, but where one inference is more reasonable than

another and is on the side of guilt, then probable cause may be said to exist.” Further, in *Hafenstein v. Burr*, 92 Ariz. 321, 322, 376 P.2d 782, 783 (1962), the Court declared that a magistrate should not find probable cause unless there is more evidence that the defendant committed the offense than that he did not. *Id.*, citing *Dodd v. Boies*, 88 Ariz. 401, 403-04, 357 P.2d 144, 145-46 (1960).

If a magistrate determines that probable cause exists that the defendant has committed a felony, the magistrate must bind a defendant over for trial. *Duke v. State*, 49 Ariz. 93, 64 P.2d 1033 (1937); *State v. Superior Court*, 103 Ariz. 369, 442 P.2d 113 (1968) [magistrate’s role is to determine if probable cause exists to bind defendant over and, if not, to release the defendant]. When a magistrate holds a defendant to answer, the magistrate can only bind the defendant over on charges which are supported by the evidence, regardless of the charge in the complaint. The charges on which the defendant is bound over must be clearly stated in the magistrate’s order of commitment. *Duke v. State*, 49 Ariz. 93, 96-97, 64 P.2d 1033, 1034-1035 (1937).